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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of the Commission's) GEN Docket No. 90-314
Rules to Establish New Personal)
Communications Services)

REPLY COMMENTS OF THE
AMERICAN WIRELESS COMMUNICATION CORPORATION

American Wireless Communication Corporation (AWCC) submits these Reply Comments in response to certain oppositions to and comments on the petitions for reconsideration and/or clarification filed in this proceeding. AWCC is a national consortium of designated entity companies who plan to bid for PCS licenses and provide PCS service in a number of Basic Trading Areas (BTAs) throughout the nation.¹

AWCC wishes to comment on a specific point that has been raised in this proceeding. Several parties have requested that the Commission clarify that a licensee is authorized to lease portions of their spectrum or enter into management agreements, or similar business arrangements, for the operation of the service by other licensees in the same market. For example, Time Warner Telecommunications requests a clarification that licensees in the lower bands are permitted to "lease, enter into joint ventures or

¹ AWCC has been an active participant in the Commission's ongoing proceeding to establish rules and policies on spectrum auctions for PCS, and has strongly supported the Commission's proposed preferences for designated entities. See, Comments of the American Wireless Communication Corporation, PP Docket No. 93-253, filed November 10, 1993; and Reply Comments of the American Wireless Communication Corporation, PP Docket No. 93-253, filed November 30, 1993.

2410

consortia, or otherwise utilize portions of spectrum licensed to others in the same band."² PCS Action has similarly requested that lower band licensees be allowed to "provide for use of a portion of their spectrum authorization to other lower band licensees that can put the spectrum to better use, either through lease or management agreements, joint venturing, consortia, or other business arrangements."³

AWCC supports PCS Action's and Time Warner's requests for clarification to the extent that such a clarification is necessary. However, AWCC submits that the Commission's policy in this regard is already clear. The Commission has long afforded its licensees broad discretion to enter into a variety of private contractual arrangements for the use of their authorized spectrum and the operation of their service by third parties, including competing licensees, provided that the leasing licensee maintains ultimate control over the facilities and otherwise complies with the Commission's rules and policies.⁴

² Petition for Reconsideration of Time Warner Telecommunications, filed December 8, 1993, at 10-11.

³ PCS Action Inc.'s Petition for Reconsideration and Clarification, filed December 8, 1993, at 10.

⁴ By contrast, we note that several parties have requested that the Commission adopt proposals that would apparently allow a licensee to give up ultimate control over a portion of their authorized spectrum, by "partitioning," "subdividing," or partially assigning their authorization. See, e.g., Opposition to Petitions for Reconsideration of Citizens Utilities Company, filed December 29, 1993, at 6-12; and Comments of McCaw Cellular Communications, Inc., filed January 3, 1993, at 23 fn. 49. As discussed below, to the extent that such proposals contemplate the transfer of licensee control, such proposals are not consistent with existing Commission policy.

For example, in the FM radio service the Commission has acknowledged that operational joint ventures, including time brokerage agreements, "are not precluded by any Commission Rule or policy as long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over the facilities."⁵ Moreover, the Commission has acknowledged that time brokerage agreements between licensees in the same market are allowed.⁶

Wireless cable is another service where the Commission has condoned the leasing of facilities by licensees. MMDS licensees frequently lease capacity on their systems to wireless cable operators, who are often also MMDS licensees in the same market, subject to the leasing licensee retaining ultimate control over its facilities.⁷ Moreover, the Commission has permitted ITFS licensees

⁵ In re Revision of Radio Rules and Policies ("Time Brokerage Order"), Report and Order, 70 RR 2d 903, 917 (1992) ("Time Brokerage Order"). See also, Intermountain Microwave, 24 RR 983, 984 (Com. Car. Bur. 1963) (licensees of common carrier microwave facilities may delegate operation of facilities to third party provided that the licensee "retains exclusive responsibility for the operation and control of the facilities"); Guidelines Concerning SMR Stations, 64 RR 2d 840 (Pvt. Rad. Bur. 1988) (private radio licensees can hire management companies for the operation of their facilities provided that they retain "supervisory control over their systems").

⁶ Time brokerage agreements between same-market licensees are subject to certain safeguards, however, that prevent the use of such agreements as a means to circumvent the Commission's broadcast ownership restrictions. See, Time Brokerage Order, supra, 70 RR 2d at 919. As discussed below, the Commission may wish to impose similar safeguards in its PCS rules to protect the integrity of its aggregation limits and eligibility restrictions.

⁷ Both FCC Form 494, and its predecessor FCC Form 435, ask applicants for new or modified MMDS licenses whether they have entered into an agreement which confers any right or interest to

to lease excess capacity to wireless cable operators to provide non-ITFS programming.⁸

There has been no indication that the Commission intends to treat its PCS licensees differently than it treats its licensees for other services on issues pertaining to licensee control of its facilities. Thus, it is consistent with existing Commission policy for PCS licensees, including the Block C and Block D licensees, to lease their facilities to other licensees and/or enter into a management agreement, joint venture or similar business arrangement with other licensees, provided that (1) the licensee maintains ultimate control over its facilities, and (2) the offering of a service on that spectrum is otherwise in compliance with the Commission's rules.

In this regard, it is important to remember then when a licensee maintains ultimate control of its facilities, the licensee is the party that is accountable to the Commission for compliance with its rules. Thus, when a PCS licensee enters into a lease, management agreement, or similar arrangement, the licensee remains responsible for compliance with the Commission's build-out

a third party. It is common practice for applicants who lease their facilities to wireless cable operators to include a copy of their lease agreement in response to this question.

⁸ See, In the matter of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing the Use of Frequencies in the 2.1 and 2.5 GHz Bands, Order on Reconsideration, 69 RR 2d 1477, 1489 (1991), wherein the Commission relaxed its limitations on non-ITFS programming over ITFS frequencies. AWCC submits that it was the provision of non-ITFS programming over ITFS frequencies, not the ability of the ITFS licensee to lease excess capacity, that required explicit authorization by the Commission.

requirements, technical requirements, anti-trafficking prohibition and other rules. In effect, therefore, the lease or management agreement-type arrangements defeat the spectrum warehousing and license trafficking concerns that the more radical "partitioning" or "subdividing" proposals raise.⁹ Those proposals apparently contemplate allowing licensees to transfer partial control of their facilities to other parties, thereby releasing the licensee from Commission accountability for that portion of the spectrum which, in turn, raises warehousing and trafficking concerns.

Indeed, ~~rapid~~ deployment of PCS services to the public is the Commission's goal, and the Commission's rules must therefore seek to establish the parameters of an orderly PCS market. Allowing unfettered alienability of licenses, as some parties have proposed, will ripen opportunities for speculators, foster marketplace disorder, and ultimately delay the introduction of PCS services to the public. On the other hand, allowing PCS licensees to enter into leasing or management agreement-type arrangements, subject to licensee retaining ultimate control and accountability, strikes the necessary balance of providing licensees the flexibility they need to efficiently use their authorized spectrum for the rapid

⁹ GTE Service Corporation suggests that it is inconsistent with the purposes of the designated entity allocation to allow the designated entities to "subdivide" their authorizations. Comments of GTE Service Corporation, filed December 30, 1993, at 9 fn. 30. However, considering that the licensee would remain in control under a lease, management agreement or similar arrangement, GTE's concern is misplaced in the context of these arrangements. Thus, there is no need to limit the designated entities from entering into these arrangements solely with other designated entities.

deployment of PCS, while deterring the speculation and license gaming that ultimately cause delay.

Finally, we note that, consistent with the Commission's policy that prohibits FM licensees in the same market from using time brokerage as a means to circumvent the Commission's broadcast ownership rules, PCS licensees in the same market could not enter into such arrangements as a means to circumvent the 40 MHz aggregation limitation or cellular eligibility rules. Therefore, to the extent that it is necessary, the Commission may wish to clarify that no single entity is allowed to operate on more than 40 MHz of spectrum. Such a clarification would ensure that the integrity of the Commission's allocation and eligibility rules is kept in tact.

WHEREFORE, AWCC requests that the Commission declare that it is consistent with existing policy for a PCS licensee to enter into a lease, management agreement or similar arrangement, provided that the licensee maintains control of its facilities and otherwise complies with the Commission's rules.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Maria Almanza, hereby certify that copies of the foregoing Reply Comments were mailed first-class, postage prepaid, to the parties on record in this reconsideration proceeding on this 13th day of January, 1994.


Maria Almanza